In the Supreme Court of the United States

OCTOBER TERM 1940.

No. 678.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

Statement of Issue 1

Misstatements in Petitioner's Statement of the Case.. 3

Summary of Argument 5

Argument 10

I. Interstate Commerce Power of Congress Validly Exercised is Supreme, Plenary, Exclusive and Unassailable 10

II. Nothing in Either the Plain Language or History of Section 6 Sustains Petitioner's Claims.. 18

III. Discussion of Authorities Cited by Petitioner... 21

IV. Petitioner's Argument that Article IV, Section 2, is Involved in Injunctions Against Suits in State Courts is Erroneous 28

V. Petitioner's Claims Concerning Inconvenience Are Patently Exaggerated 29

VI. Authorities in Opposition to Petitioner's Claims 30

VII. The Ohio Court Had No Jurisdiction Once the District Court Jurisdiction Attached 35

Conclusion 43

Appendix A.—Opinion of District Court in *B. & O. vs. Clem* (Civil Action No. 21-M, U. S. D. C., N. D. W. Va.) 45

AUTHORITIES CITED OR DISTINGUISHED.

Cases.

Atchison, T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695 ..... 6, 16

B. & M. R. R. Co. v. Whitehead, 29 N. E. (2d) 916..... 26

B. & O. v. Bole, 31 Fed. Supp. 221..... 7, 22

B. & O. R. R. Co. v. Clem, Civil Action No. 21-M, District Court U. S., Northern District of West Virginia 7, 22

B. & O. v. Inlow 7, 22

B. & O. v. Kepner, 137 O. S. 409 7

Blake v. McClung, 172 U. S. 252 28

Breisch v. Central Railroad of N. J., No. 384 U. S. Supreme Court, decided March 3, 1941 ..... 6, 14, 15

Bryant v. Atlantic Coast Line Ry. Co., 92 Fed. (2d) 569 ..... 7, 9, 24, 38, 39, 40, 41

Central National Bank v. Stevens, 169 U. S. 432, 18 S. Ct. 403, 42 L. Ed. 807 37

C. & O. v. Vigor, 90 F. (2d) 7 ..... 7, 9, 17, 21, 22, 31, 32, 43

C. M. & St. P. R. R. Co. v. McGinley, 175 Wis. 565, 185 N. W. 218 26

C. M. & St. P. R. Co. v. Schendel, 292 F. 326 ..... 6, 7, 9, 16, 17, 21, 24, 30, 39, 42

Cole v. Cunningham, 133 U. S. 107 ..... 8, 28

Connelly v. Central R. R., 238 F. 932 ..... 9, 17, 34

Continental Illinois National Bank and Trust Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110 40

Ex Parte Crandall, 53 F. (2d) 969 ..... 7, 22, 23

Davis v. Farmers' Cooperative Co., 262 U. S. 312 ... 8, 26, 35

D. & R. G. R. Co. v. Terte, 284 U. S. 284, 76 L. Ed. 295, 52 S. Ct. 152 ..... 8, 27

Detroit v. Osborne, 135 U. S. 492 29

Douglas v. N. Y., N. H. & H. R. Co., 279 U. S. 377 ..... 8, 25

Erie R. Co. v. Tompkins, 304 U. S. 64 3

Essanay Film Co. v. Kane, 258 U. S. 358, 42 S. Ct. 318, 66 L. Ed. 658 ..... 10, 40

Federal Trade Commission v. Bunte Bros. (not yet reported), 61 S. C. R. 580 18

Gibbons v. Ogden, 9 Wheat. (U. S.) 1 ..... 5, 10, 16

Herron v. So. Pac. Co., 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857 37

Hill vs. Martin, 296 U. S. 393, 50 S. Ct. 278, 80 L. Ed. 293 ..... 9, 39

Hines vs. Davidowitz (not yet reported), 61 S. C. R. 399 15

Hoffman v. The State of Mo., etc., 274 U. S. 21, 47 S. Ct. 485, 71 L. Ed. 905 ..... 8, 27

Hoxie vs. N. Y., N. H. & H. R. Co., 82 Conn. 352, 73 Atl. 754 35

Hull v. Burr, 234 U. S. 712, 34 S. Ct. 892, 58 L. Ed. 1557 40

International Milling Co. v. The Columbia Trans. Co., 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396 ..... 8, 28

Kelly v. Washington, 302 U. S. 1 ..... 6, 11

Kiser v. Motion Pictures Machine Operators' Union, 26 O. App. 284, 159 N. E. 494 3

Kline v. Burke Construction Co., 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226 ..... 10, 39

Kuchner vs. Irving Trust Co., 299 U. S. 445, 57 S. Ct. 298, 81 L. Ed. 340 ..... 6, 18

Looney v. Eastern Texas R. Co., 247 U. S. 214, 62 L. Ed. 1084, 38 S. Ct. 460 ..... 10, 40

L. & N. R. Co. v. Rogan, 172 Tenn. 593, 113 S. W. 743.. 26

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. Ed. 462 42

Maurer v. Hamilton, et al., 309 U. S. 598 13

McConnell vs. Thomson, 213 Ind. 16 ..... 8, 9, 16, 17, 25, 26

McCray vs. U. S., 195 U. S. 27 ..... 7, 20

McKane v. Darston, 153 U. S. 687 29

Michigan Central R. R. Co. v. Mix, 278 U. S. 492, 73 L. Ed. 470 ..... 8, 26, 35

M. & St. L. R. R. Co. v. Bombolis, 241 U. S. 211 9

Mintz v. Baldwin, 289 U. S. 346 12

Mo. Pac. R. Co. v. Porter, et al., 273 U. S. 341 ..... 10, 13

Mitchell v. Franklin County, 25 O. S. 143 3

Moore v. C. & O., 291 U. S. 205 ..... 6, 7, 14, 15, 17, 21

Moran v. Sturges, 154 U. S. 256, 14 S. Ct. 1019, 38 L. Ed. 981 37

Napier vs. Atlantic Coast Line R. R. Co., 272 U. S. 605. 14

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. Ed. 893 ..... 5, 10

Norris v. Ill. Central, 18 F. (2d) 584 ..... 9, 17, 21, 34

Northern Pac. R. Co. v. Washington, 222 U. S. 370 ... 10, 13

Oklahoma Packing Co. vs. Oklahoma Gas & E. Co., 309 U. S. 4, 60 S. Ct. 215, 80 L. Ed. 537 ..... 9, 39

Peck vs. Jenness, 7 How., 48 U. S. 612, 12 L. Ed. 841 ... 39

Pennsylvania Casualty Co. v. Pennsylvania, 294 U. S. 189, 55 S. Ct. 386, 79 L. Ed. 850 ..... 9, 37

Pittsburgh, C. & St. L. R. Co. vs. Moore, 33 O. S. 384, 31 Am. Rep. 543 3

Rader v. B. & O., 108 F. (2d) 980 ..... 6, 7, 9, 17, 23, 34

Railroad Commission vs. Chicago, B. & Q. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371 ..... 6, 18

Reed's Admx. v. Ill. Central R. R. Co., 182 Kentucky 455, 206 S. W. 794 26

Reid v. Colorado, 187 U. S. 137 11

Riggs v. Johnson County, 6 Wall. (73 U. S.) 166; 18 L. Ed. 768 ..... 9, 37

Robb v. Connolly, 111 U. S. 637 ..... 6, 10

Savage v. Jones, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rept. 715 ..... 10, 12

Schendel v. McGhee, 300 F. 273 ..... 9, 17

Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 Sup. Ct., 635 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475) 5, 10

S. A. L. Ry. Co. v. Kenney, 240 U. S. 489 ..... 6, 15

Second Employers' Liability Act Cases, 223 U. S. 58 ..... 5, 10, 17, 25

Seibert v. Herring, 121 O. S. 181, 167 N. E. 383 3

Sharon v. Terry, 36 F. 337 ..... 9, 36

Slaughter House Cases, 16 Wall. 77 ..... 8, 28-29

Sonzinsky v. U. S., 300 U. S. 506 ..... 7, 20

So. R'way v. Cochran, 56 F. (2d) 1019 ..... 6, 9, 17, 32, 34

So. Ry. Co. v. Painter, Admrx., 117 F. (2d) 100 ..... 7, 23

Spokane & Inland Empire R. R. v. Campbell, 241 U. S. 497, 36 Sup. Ct. 683 (60 L. Ed. 1125) 14

Standard Fashion Company vs. Magrane-Houston Co., 258 U. S. 346, 356, 42 S. Ct. 360, 66 L. Ed. 653 18

State of Missouri v. Taylor, 266 U. S. 200, 45 S. Ct. 47, 69 L. Ed. 200 ..... 8, 9, 27, 35

Steelman v. All Continent Co., 301 U. S. 278 ... 9, 37, 38, 39

Terral v. Burke Construction Co., 257 U. S. 532, 42 S. Ct. 188, 66 L. Ed. 352 ..... 9, 37

Texas & Pac. Ry. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 483, 60 L. Ed. 874 10

Trapp v. B. & O., 283 F. 655 ..... 9, 17, 33

U. S. v. Darby (not yet reported), 61 S. C. R. 451 ..... 7, 20

Veazie Bank v. Fenno, 8 Wall. 533 ..... 7, 20

Wallace v. McConnell, 13 Pet. (38 U. S.) 138, 10 L. Ed. 95 ..... 9, 36

Wells Fargo & Co. v. Taylor, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205 40

Wilson v. New, 243 U. S. 332, 61 L. Ed. 755 ..... 5, 10

Wood v. D. & H. Ry. Co., 63 Fed. (2d) 235 ..... 9, 17, 35

Texts.

21 *C. J.* (Secundum) 807 ..... 9, 36

8 *Ohio Jurisprudence* 132 ..... 7, 20

Roberts Federal Liabilities of Carriers, 2nd Edition, Vol. 2, p. 1856 29

14 *R. C. L.*, p. 419, Sect. 122 37

21 *Ruling Case Law*, pp. 509, 510 3

Constitution.

Constitution of the United States, Article IV, Section 2 ..... 8, 28

Constitution of the United States, Article VI, Clause 2 ..... 6, 42

Statutes.

Federal Employers' Liability Act, Section 6 1

Judicial Code, Sec. 51 19

Judicial Code, Section 262 39

Judcial Code, Section 265 (Title 28, U. S. Code, Sec. 379, R. S. 720) 24, 38, 39

Report 432 from the Committee on the Judiciary of the Senate to accompany H. R. 17263 (Senator Borah) 19

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THE BALTIMORE & OHIO RAILROAD COMPANY,
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v.

FREDERICK S. KEPNER,
Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

STATEMENT OF ISSUE.

Section 6 of the Federal Employers' Liability Act provides:

> "Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States." (Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291, 45 U. S. C. Section 56.)

The respondent, an Ohio resident in petitioner's employ, was injured while engaged in interstate commerce. His action to recover damages for such injuries is brought under the Federal Employers' Liability Act. Section 6

of the Act, quoted above, permits the respondent's action to be brought in a District Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. No language qualifying or limiting such choice of a District Court thus vested in respondent is contained in the Act. The respondent chose to file his action in the District Court for the Eastern District of New York, in which district the petitioner admittedly was doing business at the time of commencing such action. No objection is raised to the jurisdiction of such District Court. (Petitioner's Brief, p. 40.)

The petitioner contends, however, that the choice of a District Court vested in the respondent by Section 6 of the Act must be exercised by him in coincidence with and subject to an alleged rule of Ohio law which would permit an Ohio state court of equity to enjoin the respondent in such choice of a District Court in which to bring his action when thereby the petitioner is caused much greater inconvenience and expense than would be the case were respondent to choose a District Court in some other jurisdiction likewise rendered available to him by the Act.

Assuming first, that in the instant case the demurrer interposed by the respondent in order to test the sufficiency in law of the petition filed against him, admits such allegations contained therein as would permit an Ohio court of equity to invoke such alleged Ohio law were it properly applicable to the respondent in the prosecution of his action under the Federal Employers' Liability Act, we submit that the contention of the petitioner is erroneous and untenable.

MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE.

The petitioner, in its statement of the case and at several points in its brief, refers to an allegation of conspiracy "to bring the action at a distant point for the purpose of annoying, harassing and vexing the petitioner without a sound and proper purpose of reasonably prosecuting any right of action that the respondent had against the petitioner," * * * a proceeding which it claims "would result in no benefit to the respondent" as "admitted by the demurrer of respondent to be true." Such assumption by the petitioner is inaccurate and unwarranted, both in fact and in law.

No facts constituting any such alleged conspiracy are stated in the petition or in the supporting affidavits filed in the instant case. The mere allegation of conspiracy as contained in the petitioner's petition is a mere conclusion of law. (*Kiser v. Motion Pictures Machine Operators' Union*, 26 O. App. 284, 159 N. E. 494.) A demurrer admits only such facts as are well-pleaded and does not admit the correctness of any conclusions of law. (*Pittsburgh, C. & St. L. R. Co. vs. Moore*, 33 O. S. 384, 31 Am. Rep. 543; *Mitchell v. Franklin County*, 25 O. S. 143.) The demurrer interposed by the respondent admits only such well-pleaded facts as are contained in the petition, solely for the purpose of testing their sufficiency in law. (*Seibert v. Herring*, 121 O. S. 181, 167 N. E. 383; 21 *Ruling Case Law*, pp. 509, 510.) The "syllabus" read in the light of the facts as stated in the opinion "states the law of the case." (Petitioner's Brief, 9.) The law of the state is that contained in the decision of its court of last resort. (*Erie R. Co. v. Tompkins*, 304 U. S. 64.)

The Ohio Supreme Court states clearly in its opinion (R. 25) and in the syllabus of the instant case the facts admitted by the demurrer interposed by the respondent. Nowhere, either in the opinion or the syllabus, does it ap-

pear that the demurrer admitted any such mere allegation of conspiracy as stated by the petitioner. Both the opinion and the syllabus of the Ohio Supreme Court in the instant case show clearly that the demurrer raised the legal sufficiency of the factual allegations with reference to inconvenience and expense. The petitioner does not specify that the Supreme Court of Ohio erred in construing the demurrer to admit only these facts for the purpose alone of testing the legal sufficiency thereof. Though the petitioner states, as a mere conclusion of law, that the respondent has filed his suit without a sound and proper purpose of reasonably prosecuting his right of action in the District Court which the respondent chose, it is significant that in its brief the petitioner makes repeated references to the medical witnesses as "highly important" and the nature and extent of the injuries as stated in the respondent's petition for damages (R. 6) give indication that the petitioner fears not that the respondent will fail to prosecute his cause of action, but that on the contrary he will reasonably and vigorously prosecute such right of action arising by reason of the severe injuries sustained by him.

The allegation of conspiracy, as revealed in the instant case, simmers down to this: That as between several forums made available to him by a positive, clear, vested right of choice, the employee under the Federal Employers' Liability Act chooses one which he may believe offers some remedial advantage, whether it be an opportunity to have the trial of his cause accelerated and thus disposed of without the delay which a crowded docket in another forum may present, or an opportunity to have the merits of his cause determined in an urban as against a rural community or whatever other remedial advantage may to him appear to exist.

For a citizen of the United States thus to invoke a right created by an admittedly valid and constitutional enactment of the Congress of the United States, acting in

that realm of power in which the Constitution of the United States makes its action supreme and exclusive, and designed for his benefit, we submit, certainly is not to do an unlawful thing or to accomplish a lawful purpose by unlawful means.

Were any further proof needed to show that the petitioner's references to an alleged conspiracy and the other mere conclusions of law are entirely unwarranted and alien to the issue in this case, it is to be found in the petitioner's own statement of the questions involved in the instant case as appears on pages 9 and 10 of the petitioner's brief. There one finds absolutely no reference to any alleged "conspiracy." No conspiracy existed; none is admitted. The question and the only question here involved is whether or not the Supreme Court of Ohio erred in its statement of the law found in the syllabus quoted on page 9 of the petitioner's brief, namely:

> "The State courts of this State cannot, in the exercise of their equity powers, enjoin a resident of the State from prosecuting a cause of action, arising under the Federal Employers' Liability Act, in a Federal Court of another State having jurisdiction of such action, even though such cause of action arose and may be prosecuted in this State, and even though its prosecution in the Federal Court of another State may cause great inconvenience and expense to the defendant."

SUMMARY OF ARGUMENT.

I. (A) The power of Congress over interstate commerce is supreme, plenary, exclusive, complete in itself, and not to be hampered by the action of the states or state courts. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Second Employers' Liability Act Cases*, 223 U. S. 58; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501; *Wilson v. New*, 243 U. S. 332; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

(B) Laws of the United States made in pursuance of federal constitution are supreme law of the land binding

judges in every state. *Robb v. Connolly*, 111 U. S. 637; Article VI, Clause 2—Constitution of the United States.

(C) State regulations and laws are invalid (a) if in conflict with an express regulation by Congress (b) if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action (c) where federal regulation has occupied the field. *Kelly v. Washington*, 302 U. S. 1.

(D) Federal Employers' Liability Act drew to itself right of action for injuries or death of employee within its purview and such action under the Act must be brought as prescribed in it. *Moore v. C. & O.*, 291 U. S. 205; *Breisch v. Central Railroad of N. J.*, No. 384 U. S. Supreme Court, decided March 3, 1941; *S. A. L. Ry. Co. v. Kenney*, 240 U. S. 489.

(E) The right in respondent to sue in Federal District Court in the district where petitioner is doing business is clear and unqualified and compels such Court to assume jurisdiction. *Moore v. C. & O., supra*; *So. R'way v. Cochran*, 56 F. (2d) 1019; *Rader v. B. & O.*, 108 F. (2d) 980; *C. M. & St. P. R. Co. v. Schendel*, 292 F. 326; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55.

II. Nothing in either the plain language or the history of Section 6 of the Federal Employers' Liability Act sustains contention that right to invoke a federal court's jurisdiction therein provided is subject to the equity powers of a state court.

(A) The language is clear, direct, unqualified and unambiguous and its obvious meaning controls. *Railroad Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 588, 589; *Kuchner v. Irving Trust Co.*, 299 U. S. 445, 449.

(B) History of Act shows intent to enlarge rights and privileges of employees.

(1) Successive enactments rendering recovery easier of accomplishment; extending statute of limitations.

(2) Report 432 from Committee on the Judiciary pointing out that situation existing before Section 6 was enacted was a "grave injustice to the plaintiff," and purpose of the statute was to "extend and enlarge the remedy provided by law to employees."

(C) The wisdom or lack of wisdom in the enactment of Section 6 is not a matter for judicial appraisal. *U. S. v. Darby*, 61 S. Ct. 451; *McCray v. U. S.*, 195 U. S. 27; *Sonzinsky v. U. S.*, 300 U. S. 506, 513; *Veazie Bank v. Fenno*, 8 Wall. 533; 8 *Ohio Jurisprudence* 132.

(D) Right of employee is one to sue in "any" federal Court having jurisdiction. *Moore v. C. & O., supra; C. & O. v. Vigor*, 90 F. (2d) 7; *C. M. & St. P. v. Schendel, supra.*

III. Discussion of Authorities Cited by Petitioner.

B. & O. v. Inlow—overruled and discountenanced in *B. & O. v. Kepner*, 137 O. S. 409.

B. & O. v. Bole, 31 Fed. Supp. 221; overruled in *B. & O. v. Clem*, by same Court. Opinion of *Clem* case, Appendix A.

Ex Parte Crandall, 53 F. (2d) 969—not in point, action of employee filed in state court; any authority claimed for it by petitioner being dissipated by decision by same Circuit Court of Appeals in *Rader v. B. & O.*, 108 F. (2d) 980.

So. R'way v. Painter—Injunction by state court in ex parte hearing, held void in *Painter v. So. R'way*, 117 F. (2d) 100.

Bryant v. A. C. L. R. Co. 92 F. (2d) 569 concerned right of federal court to enjoin a state court which was not disturbing the federal court's jurisdiction, federal court action based on statute prohibiting injunction to stay proceedings in any state court.

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such

injunction may be authorized by any law relating to proceedings in bankruptcy." Sec. 379, Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265.

Douglas v. N. Y., N. H. & H. R. Co., 279 U. S. 377. Suit of employee brought in state court. The Federal Employers' Liability Act does not purport to compel a state court to assume jurisdiction as against an otherwise valid excuse. But this Court has held consistently that jurisdiction of federal court under the Act is mandatory.

Cases where injunctive relief was granted.

(1) Where employee sued in State Court.

(a) Indiana cases differentiated by Indiana Supreme Court in *McConnell vs. Thomson*, 213 Ind. 16.

(b) *Mich. Cent. v. Mix*, 278 U. S. 492.

(2) Cases other than Federal Employers' Liability Act cases.

(a) *Davis v. Farmers' Cooperative Co.*, 262 U. S. 312, differentiated in *State of Missouri v. Taylor, infra; Hoffman v. State of Missouri, infra; D. & R. G. R. Co. v. Terte, infra; International Milling Co. v. The Columbia Trans. Co.*, 292 U. S. 511.

IV. View of the petitioner that Article IV, Section 2 of the Constitution of the United States may be said to be violated where state enjoins suit by its own citizen in another state is bottomed on failure to understand that said Article IV, Section 2 does not govern the relationship between a state and its own citizens and requires only that a state not discriminate as against citizens of another state. *Slaughter House Cases*, 16 Wall. 77; *Cole v. Cunningham*, 133 U. S. 107.

V. Petitioner's claims concerning inconvenience are exaggerated. New rules governing procedure in federal district courts afford opportunity to eliminate element of surprise, narrow issues and even opportunity for summary judgment.

VI. Authorities in Opposition to Petitioner's Claims. *C. M. & St. P. v. Schendel, supra; C. & O. v. Vigor, supra; So. R'way v. Cochran*, 56 F. (2d) 1019; *McConnell v. Thomson, supra; Schendel v. McGhee*, 300 F. 273, 278; *Trapp v. B. & O.*, 283 F. 655; *Connelly v. Central R. R.*, 238 F. 932; *Norris v. Ill. Central*, 18 F. (2d) 584; *Rader v. B. & O., supra; Wood v. D. & H. R'way*, 63 F. (2d) 235; *Painter v. So. R'way, supra.*

VII. The Ohio Court had no jurisdiction of the subject of the action after District Court jurisdiction attached.

(a) Grant of concurrent jurisdiction gives plaintiff choice of court. As an incident he is entitled to whatever remedial advantage inheres in the particular forum. *M. & St. L. R. R. Co. v. Bombolis*, 241 U. S. 211; *Mo. etc. v. Taylor, supra*; 21 *C. J.* (Secundum) 807.

(b) State Court without power to arrest jurisdiction of federal court. *Sharon v. Terry*, 36 F. 337, 355; *Wallace v. McConnell*, 13 Pet. (U. S.) 138, 151; *Terral v. Burke Construction Co.*, 257 U. S. 532; *Pennsylvania Casualty Co. v. Pennsylvania*, 294 U. S. 189, 197; *Riggs v. Johnson County*, 6 Wall. (73 U. S.) 166.

Steelman v. All Continent Corp., 301 U. S. 278. Injunction allowed by federal court where its jurisdiction under bankruptcy act was likely to be thwarted by filing of other suit. This case, in fact, would seem to support the view that the jurisdiction of the federal court for the Eastern District of New York should likewise be protected from a state court of equity which by injunction, to all intents and purposes, would impair jurisdiction of federal court and nullify Section 6.

Injunction against the respondent would in effect be an injunction against the Federal District Court. *Hill v. Martin*, 296 U. S. 393, 403; *Oklahoma Packing Co. v. Oklahoma G. & E.*, 309 U. S. 4, 9; *Painter v. So. R'way, supra.*

Federal Court has inherent right to protect its proper jurisdiction against impairment and interference and hence

state court is without jurisdictional power where effect of state court action is to interfere with federal court jurisdiction already acquired. *Kline v. Burke Construction Co.*, 260 U. S. 226, *Looney v. Eastern Texas Co.*, 247 U. S. 214; *Essanay Film Co. v. Kane*, 258 U. S. 358, 361.

ARGUMENT.

I. INTERSTATE COMMERCE POWER OF CONGRESS VALIDLY EXERCISED IS SUPREME, PLENARY, EXCLUSIVE AND UNASSAILABLE.

Article I, Section 8 of the Constitution of the United States vests in the Congress of the United States a power over interstate commerce which is supreme, exclusive, plenary, complete in itself and not dependent on and not to be hampered by the action of the states. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; *Savage v. Jones*, 225 U. S. 501, 533, 56 L. Ed. 1182, 1195, 32 Sup. Ct. Rept. 715, 726; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 501, 34 Sup. Ct., 635, 638 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475); *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33, 41, 36 Sup. Ct. 483, 60 L. Ed. 874; *Second Employers' Liability Act Cases*, 223 U. S. 58, 32 Sup. Ct., 169, 178, 56 L. Ed. 327; *Northern Pac. R. Co. v. Washington*, 222 U. S. 370; *Mo. Pac. R. Co. v. Porter, et al.*, 273 U. S. 341; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893.

In *Robb v. Connolly*, 111 U. S. 637, Justice Harlan said:

> "Upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whever those rights are involved in any suit or proceeding before them, for the judges of the state courts are required to take an oath to support that Constitution and they are bound by it and the

laws of the United States made in pursuance thereof, and all treaties made under their authority as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding' (Article VI, Clause 2 of the Constitution of the United States)."

This Court, recently, in *Kelly v. Washington*, 302 U. S. 1, discussed at some length the validity of state regulations or laws affecting interstate commerce. In the *Kelly* case there was before this Court the validity of state regulations providing for inspection of the hull and machinery of certain motor-driven tugs concerning which no provision of the federal laws were applicable. The state court had held that Congress had occupied the field and that no room was left for any state action in relation to vessels plying on navigable waters within the control of the federal government. This Court found the state regulation however to touch "that which the federal laws and regulations have left untouched" and that there was "plainly no inconsistency with the federal provisions." The syllabus (4) points to the instances where state regulation affecting interstate commerce is invalid. These are there stated to be (a) if in conflict with an express regulation by Congress; (b) if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action; and (c) where federal regulation has occupied the field.

Cases referred to by petitioner and by the Court in the *Kelly* case, *supra*, where state regulations or laws affecting interstate commerce have been held valid, were instances which did not fall into one or another of the categories referred to above. Thus in *Reid v. Colorado*, 187 U. S. 137, the Federal Act went no further than to make it an offense against the United States for one knowingly to take or send from one state to another live stock affected with infectious or communicable disease. The state statute required a certificate that the cattle were free from disease,

irrespective of shipper's knowledge of the actual condition of the cattle. It was held that the state statute did not cover the same ground as the Act of Congress and was not inconsistent with it.

Savage v. Jones, 225 U. S. 501, was a case in which an Indiana statute required a statement of the formula of ingredients of concentrated commercial food for stock. Such statute was held not repugnant to the Food and Drug Act of 1906 which dealt with the subject of adulterated and misbranded foods and defined misbranding. The Federal Act did not require a disclosure of ingredients though it covered any false or misleading statements as to ingredients. It was held that the state statute dealt with the omitted matter and did not impair the operation of the Federal Act as to matters with which such Act dealt.

In *Mintz v. Baldwin*, 289 U. S. 346, the state law required certification by the chief sanitary official of the state of Oregon that the cattle brought into the state for dairy or breeding purposes and also the herds from which they came are free from Bangs disease. The Cattle Contagious Disease Act of 1903 provided for regulation by the Secretary of Agriculture in order to prevent spread of the disease among cattle and live stock and when an inspector of the Bureau of Animal Industry certified that he had inspected the cattle and found them free from communicable disease they were permitted to be transported "without further inspection," but this Court held that the express exclusion of state inspection extended only to cases where there had been federal inspection and a certificate had been issued and that, therefore, such exclusion of state inspection could not be extended to a case where the cattle had not been inspected and certified by federal authority.

A Pennsylvania statute which prohibited the operation on the highways of that state of any vehicle above the cab of the carrier vehicle and applied to interstate carriers

was held, in *Maurer v. Hamilton, et al.*, 309 U. S. 598, to be consistent with the commerce clause. This Court pointed out that the Federal Motor Carrier Act of 1935 provided in Section 204 that the Interstate Commerce Commission was empowered to establish reasonable requirements with respect to safety of operation and equipment, but that its authority with respect to sizes and weights of the vehicles is expressly limited in Section 225 to investigation and report on the need of regulation, and this Court held the Pennsylvania statute to be a weight and size regulation within the meaning of said Section 225 and within the regulatory authority of the state reserved by that section from the authority granted to the Commission by Section 204.

The cases cited by petitioner on pages 13 and 14 of its Brief are all instances in which the state regulations or rules concerned matters about which Congress had not undertaken to legislate. Thus these cases are wholly inapplicable to an instance where Congress has expressly regulated the matter involved.

The exclusive, supreme and plenary character of Congressional power over interstate commerce, however, has been often stated and exemplified. Thus in *Northern Pac. R. Co. v. Washington, supra*, wherein was involved an act regulating the hours of labor of employees engaged in interstate commerce, this Court held that the Congress, by enacting a statute in regard to a subject within its exclusive power, emphasizes its purpose to call that power into effect and at once removes that subject from the sphere of state action.

In *Missouri Pac. R. Co. v. Porter, supra*, this Court said, at page 346:

> "its power (that of Congress) to regulate such commerce and all its instrumentalities is supreme and as that power has been exerted, state laws have no application. They cannot be applied in coincidence

with, as complementary to, or as in opposition to federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

This Court, in *Napier vs. Atlantic Coast Line R. R. Co.*, 272 U. S. 605, held the Boiler Inspection Act so to have occupied the field of regulating locomotive equipment on interstate highways that state legislation requiring cab curtains and automatic fire doors is precluded and such matters are left to the regulatory power reposed by the act in the Interstate Commerce Commission.

An action under the Federal Employers' Liability Act, this Court said in *Moore v. C. & O.*, 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755, at page 216:

"*must be brought as prescribed in the Federal Employers Liability Act.* * * * When the Act was enacted, it drew to itself the right of action for injuries or death of the employees within its purview who were engaged in interstate commerce."

Very recently in *Breisch v. Central Railroad of New Jersey*, No. 384, October Term, 1940, decided by this Court on March 3, 1941, it is said:

"The Federal Employers' Liability Act does give a right of action and fixes the tribunals where it may be enforced. *Moore v. C. & O.*, Sections 1 and 6, 45 U. S. C. 51, 56."

In *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497, 509, 36 Sup. Ct. 683, 689 (60 L. Ed. 1125) this Court said, apropos the employer's effort to invoke certain sections of the Idaho Code adverse to the employee's rights, that:

"Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield."

Certainly now there can be no question that the Federal Employers' Liability Act, insofar as it deals with the subjects to which it relates, is supreme and exclusive. See *S. A. L. Ry. Co. v. Kenny*, 240 U. S. 489.

Recently in *Hines vs. Davidowitz* (not yet reported), 61 S. C. R. 399, 410, where there was involved a state act regulating aliens, this Court held such regulation of aliens so intimately blended and intertwined with the responsibilities of the national government that where it acts and the state also acts on the same subject, the act of Congress or the treaty is supreme and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. This Court in the *Hines* case pointed out that "states cannot inconsistently with the purpose of Congress conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations."

In the instant case, then, the respondent governed by the Federal Employers' Liability Act has invoked a choice specifically vested in him by the Congress in clear, explicit and unambiguous language. He has chosen to file his action in the District Court for the Eastern District of New York. The Congress, having drawn to itself the right of action for injuries of such an employee as the respondent, made available to him such choice of jurisdiction. (*Moore v. C. & O., supra.*) The Congress fixed the tribunals where the respondent's action could be filed. (*Breisch v. Central R. of N. J., supra.*) The petitioner now seeks to thwart and frustrate such choice by invoking a state law of equity. If such injunction against the choice unqualifiedly provided for by Congress, be allowed, does it not directly conflict with and nullify the Congressional enactment? We submit that such state regulation of necessity is repugnant and contrary to and violates and interferes with an "express regulation by Congress." The state law under such circumstances, of necessity, must yield and be deemed inapplicable to the instant case.

In *Chicago, M. & St. P. Ry. Co. v. Schendel*, 292 Fed. 326, the first paragraph of the syllabus reads:

> "Under the Employers' Liability Act, Section 6, the * * * jurisdiction thus conferred on the Courts of the United States cannot be interfered with by a state, either through its Legislature or Courts, and a state statute which prohibits a citizen of a state from bringing an action under the Act in a Federal Court of a district in which the defendant is doing business, is unconstitutional."

Chief Justice Marshall in *Gibbons v. Ogden*, *supra*, phrased the law pertinent hereto as follows:

> "Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

Were the legislature of the State of Ohio to declare a series of equity principles governing its Courts and legislate to the effect that no person resident in Ohio could bring suit for the recovery of personal injuries in any district other than in the State of Ohio, unquestionably such legislation insofar certainly as it conflicted with the Federal Employers' Liability Act would be unconstitutional. See *Atchison, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695. Certainly the equity powers of a state court can not rise above the rights of the State itself in the exercise of its full sovereign power. *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986.

At the risk of being repetitious, let us again refer to the following salient and dispositive factors. The respondent's cause of action is governed by the Federal Employers' Liability Act. Such Act by an express regulation by Congress

in clear, explicit and unambiguous language vests in the respondent a right to institute his suit in the District Court which he chose. Nothing contained in the Act limits or qualifies such exercise of choice. The District Court chosen was admittedly under a mandatory duty to assume jurisdiction of the respondent's action. (Petitioner's Brief, p. 29.) The Court cannot be concerned with the justice or the wisdom of Section 6. *Second Employers' Liability Act Cases*, 223 U. S. 58, 32 Sup. Ct., 169 178, 56 L. Ed. 327. *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402, 78 L. Ed. 755; *Schendel v. McGhee, District Judge*, 300 Fed. 273; *Norris v. Ill. Central*, 18 Fed. (2) 584; *Trapp v. B. & O.*, 283 Fed. 655; *Connelly v. Central R. Co. of New Jersey*, 238 Fed. 932; *So. Railway v. Cochran*, 56 Fed. (2d) 1019; *Wood v. D. & H. Ry. Co.*, 63 Fed. (2d) 235; *C. & O. v. Vigor*, 90 Fed. (2d) 7; *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986; *Rader v. B. & O. R. R. Co.*, 108 Fed. (2d) 980.

If the respondent in the exercise of that choice provided by express Congressional regulation, is to be made subject to a rule of Ohio law requiring him to minimize the inconvenience and expense caused the petitioner by such action, how can it be said that the Ohio law does not violate, curtail and interfere with the express Congressional regulation? To endow a state court with power to enjoin the respondent from prosecuting his action under the Federal Employers' Liability Act in a District Court in a district in which jurisdiction is expressly provided for in such Act is certainly irreconcilable with the doctrine of Congressional supremacy in the field of interstate commerce. Such state power if valid would render nugatory the express regulation by Congress, and what then becomes of the exclusive and plenary character of Congressional power over interstate commerce?

See *C. M. & St. P. R. Co. v. Schendel, supra*, at page 329, where the Court said:

"It is difficult to take seriously, in this day of our national history, the proposition that a state can be permitted so to destroy the power of a federal court to carry on the work given to it under the acts of Congress. If witnesses, by order of a state court, can be prevented from testifying in a federal court, then the federal court is a mere shell to be crushed by the pressure of the state court injunction. *If a state can compel a citizen to give up one federal right as a prerequisite to bringing suit in a federal court, it can compel him to give up all federal rights. It is a proposition fraught with amazing consequences.*" (Italics ours.)

II. NOTHING IN EITHER THE PLAIN LANGUAGE OF HISTORY OF SECTION 6 SUSTAINS PETITIONER'S CLAIMS.

The language of Mr. Justice Frankfurter in *Federal Trade Commission v. Bunte Bros.* (not yet reported), 61 S. C. R. 580, 582, cited by petitioner that "we ought not to find in Section 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated," suggests that it is the petitioner who in the instant case seeks to indulge in radiations far beyond the "obvious meaning of language." It seeks to read into an Act of Congress, language which is in conflict with and repugnant to the language actually used by Congress. The words employed by the Congress to express its intention ought certainly to be persuasive when such words are simple, plain and unambiguous. See *Railroad Commission vs. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588 589, 42 S. Ct. 232, 66 L. Ed. 371; *Standard Fashion Company vs. Magrane-Houston Co.*, 258 U. S. 346, 356, 42 S. Ct. 360, 66 L. Ed. 653; *Kuehner vs. Irving Trust Co.*, 299 U. S. 445, 449, 57 S. Ct. 298, 81 L. Ed. 340.

Is there anything in the legislative history of the Federal Employers' Liability Act which points to an intent or purpose on the part of Congress to serve the convenience of the employer defendant and to compel the employee to bring his action in a District Court in a district where it

would not result in greater inconvenience and expense to the defendant than in some other district?

We submit that the background of the Federal Employers' Liability Act shows a clear Congressional intent to liberalize the Act in favor of the employee. From time to time the rights and privileges of the employee under the Federal Employers' Liability Act have been enlarged and increased. One need only recall the abolition of the fellow servant rule, the provisions making contributory negligence a *pro tanto* defense, creating an absolute liability in Safety Appliance Act cases, finally abolishing entirely the defense of assumption of risk and extending from one year to two years and now to three years the statute of limitations.

Particularly with reference to Section 6, the language of which became a part of the Act by amendment in 1910, it is clear that such amendment was enacted for the benefit of the employee. Before the amendment was enacted, the only District Court in which an employee could institute his action under the Act was that District Court in the district of which the defendant employer was an inhabitant. (Sec. 51, Judicial Code.) This was true even if diversity of citizenship existed. Senator Borah reporting for the Senate Committee on the Judiciary pointed out that such a situation was "a grave injustice to the plaintiff." (Report 432 from the Committee on the Judiciary of the Senate to accompany H. R. 17263.)

Senator Borah's Committee Report, page 21, further declares the purpose of the Liability Act as follows:

> "it is important at the outset to understand that the purpose of Congress in this act was to extend further protection *to employees.* * * * It is manifest from a consideration of the reports, both of the Senate and House Committee, when the measure was pending before those bodies prior to its enactment *that the purpose of the statute was to extend and enlarge the remedy provided by law to employees.*" (Italics ours.)

The Congress was well aware that railroad lines extended over many hundreds of miles and Congress well knew that the language in the first sentence of Section 6 vested in the employee a choice of three distinct districts in which to institute his action. If Congress intended to make this choice conditioned upon matters of convenience and expense to the employer, it could easily have provided for such limitations. If Congress had intended to limit the choice of jurisdiction to be lodged in the employee to either the district in which the defendant resided, or in which the cause of action arose, the Congress could very readily have omitted the clause which provided that such suit may be filed in the district in which the defendant shall be doing business at the time such action is commenced. The obvious purpose of the entire Act and particularly of the first sentence of Section 6 was to enlarge a privilege vested in the employee. Certainly by no verbal gymnastics can one read into this historical background and the language employed any intent to subject the exercise of this privilege thus vested in the employee to the convenience of the employer.

The wisdom or lack of wisdom of the congressional enactment is not a matter for judicial appraisal. "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. (*U. S. v. Darby* (not yet reported), 61 S. C. R. 451, citing *McCray vs. U. S.*, 195 U. S. 27; *Sonzinsky v. U. S.*, 300 U. S. 506, 513.)

> "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." (*Veazie Bank v. Fenno*, 8 Wall. 533.)

In 8 *Ohio Jur.*, page 132, we find the statement that:

> "Although a Constitution should receive a liberal construction, equity cannot be permitted to override the Constitution. In determining constitutional ques-

tions, the judiciary should not attempt to solve them by reasoning only along the lines of the principles of equity, but the reasoning should be along the lines of the Constitution, for it may be that the very object of the Constitution is to abandon and cut loose from what had theretofore been regarded as equity in particular cases, or upon a particular subject matter. The question is, in the ultimate analysis, not what would be equitable, but what is constitutional. (*State ex rel. Schwartz v. Ferris*, 53 O. S. 314, 30 L. R. A. 218, 41 N. E. 579.) Clearly, whether a constitutional limitation is wise or unwise, it is not within the province of the court to eliminate it. (*Cleveland Teleph. Co. v. Cleveland*, 98 O. S. 358, P. U. R. 1919C, 136, 121 N. E. 701.)"

It is the petitioner's contention that Section 6 does not permit suit in any District Court having jurisdiction because the word "any" is not used. The contention reflects the weakness of petitioner's claims. Suffice it to say apropos thereof that no citation in support of such view is given for none exists. On the other hand the authorities indicate clearly the existence of the right to institute such suit under the Act in any District Court having jurisdiction. See *Moore v. C. & O., supra; C. & O. v. Vigor*, 90 Fed. (2d) 7, certiorari denied 302 U. S. 705, 58 S. C. R. 25, 82 L. Ed. 545; *Norris v. Illinois Central R. Co.*, 18 Fed. (2d) 584, and *C. M. & St. P. etc. v. Schendel, supra*, in which case the Court, at page 330, speaks of the "bald fact that the right existed * * * to bring the case * * * *in any* (italics ours) district where appellant was doing business."

III. DISCUSSION OF AUTHORITIES CITED BY PETITIONER.

Not a single court of last resort anywhere has sustained an alleged right to enjoin an employee from prosecuting an action under the Federal Employers Liability Act in a District Court in any district in which the defendant was doing business at the time of commencing the action.

B. & O. R. R. Co. v. Indow (Petitioner's Brief, 29) was an Ohio Court of Appeals' decision definitely overruled and discountenanced by the Ohio Supreme Court in the instant case.

B. & O. R. R. Co. v. Bole, 31 Fed. Supp. 221, was by a U. S. District Court in West Virginia. The injunction by the Court in that case was in an ex parte hearing concerning which we pointed out in our brief in opposition to the petition for certiorari that "as obvious as the fact that such Court had before it only the railroad company contentions is the fact also that the Court was not fully and correctly apprized of the applicable law." This observation is borne out by the fact that on January 15, 1941 in a case entitled *B. & O. R. R. Co. v. Clow*, Civil Action No. 21-M, District Court U. S., Northern District of West Virginia, the same Judge who ruled in the *Bole* case, but this time benefited by a fuller presentation of the applicable law, reversed himself and denied an injunction on the authority of *C. & O. Ry. Co. v. Vigor, supra*. The Court said in its opinion, attached hereto, as Appendix A.

> "However, at the time of the decision in the *Bole* case, the Court's attention was not directed to the decision of the District Court for the Southern District of Ohio, in the case of *C. & O. Ry. Co. vs. Vigor*, 17 Fed. Sup. 602, nor to that of the Circuit Court of Appeals for the 6th Circuit, affirming the same. See *C. & O. Ry. Co. vs. Vigor*, 90 Fed. (2) 7.
>
> " * * *. The *Vigor* case, above cited, appears to me to be directly in point.
>
> " * * * Under these circumstances I feel that I must follow the decision in the *Vigor* case and applying that decision to the facts before me, must refuse a temporary injunction, must dissolve the temporary restraining order, heretofore issued, and must dismiss the present action."

The petitioner refers also to *Ex Parte Crandall*, 53 Fed. (2d) 969, as if in that case the United States Circuit

Court of Appeals for the 7th Circuit seemed to sustain the petitioner's claims. In the *Crandall* case the right of a litigant under the Federal Employers' Liability Act to institute his suit in a district court of any district in which the defendant was doing business at the time such action was commenced, was not in issue in any respect and the Court specifically stated in its opinion:

> "whether the power of the state court to restrain would extend to the commencement of such suits in any federal court is not here involved."

More recently, the 7th Circuit Court of Appeals had before it the case of *Rader v. B. & O.*, 108 Fed. (2) 980, certiorari denied April 1, 1940, 309 U. S. 682. In that case an Ohio resident instituted his action under the Federal Employers' Liability Act in a state court of Illinois and then later in the United States District Court of Illinois. An Ohio state court issued an order against the claimant restraining his prosecution of the action in the state court and later in the federal court. But the Circuit Court of Appeals, page 985, said:

> "In the second place, we are convinced that even though the restraining order of the Ohio state court had included a restraint against the prosecution of the instant case, it would have been without force."

Syllabus 8 of the same case reads:

> "Ohio state courts had no power to enjoin federal court suit brought under Federal Employers' Liability Act, notwithstanding constitutional provision requiring due faith and credit to be given to judicial proceedings of various states."

Though the instant petitioner was a party litigant in both the *Clem* and *Rader* cases, *supra*, neither case, significantly, is referred to in petitioner's brief.

In *So. Ry. Co. v. Painter, Adm'x.*, 117 F. (2d) 100, the Circuit Court of Appeals for the 8th Circuit affirmed a District Court injunction restraining the Company from

prosecuting a suit instituted by it in a Tennessee State Court where it, in an ex parte hearing, obtained an order restraining its employee from suing in the District Court. This case follows *C. M. & St. P. R. Co. v. Scheidel, supra.*

Bryant v. Atlantic Coast Line Ry. Co., 92 Fed. (2d) 569, did not involve the question here presented. In that case it was held only that the Federal District Court would not enjoin an action in the state court of Virginia, so long as that action did not disturb the Federal Court's jurisdiction. The Court suggested that the remedy of Bryant was to contest the Virginia action and to appeal from any Virginia decision. The Court, in the *Bryant* case, refers to Sec. 379 of Title 28, U. S. Code, R. S. 720, Jud. Code Sec. 265, which provides that:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

On page 576, the Court says:

> "That this section covers the situation, literally admits of no debate."

It must be apparent, therefore, that the *Bryant* case did not intend to become and is not to be considered as authority for the proposition urged by petitioner.

As the opinion in the Ohio Supreme Court in the instant case puts it (R. 43):

> "The Circuit Court of Appeals did not put any stamp of approval upon the right of the state court of Virginia to enjoin the plaintiff from prosecuting his action in the federal court, but held that the District Court was right in not issuing a counter injunction against the defendant in prosecuting its injunction suit in Virginia."

In the instant case the respondent did exactly what was pointed out in the *Bryant* case as being the proper procedure for the employee to take.

Douglas v. N. H. & H. R. Co., 279 U. S. 377, was a case in which this Court held that nothing in the Act of Congress purported to force a duty upon a state court to assume jurisdiction of an action under the Federal Employers' Liability Act as against an otherwise valid excuse. This Court pointed out that

> "it may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty."

But a federal court in a district in which the defendant is doing business is given no discretion with reference to the exercise of its jurisdiction (*Second Employers' Liability Act Cases, supra*). It is readily apparent that the *Douglas* case lends no support to petitioner's contentions.

The Indiana cases in which an employee was restrained from prosecuting his action in a state court are distinguished from the situation which arises when the employee invokes his right to choose a U. S. District Court in which to file his action, in *McConnell v. Thomson*, 213 Ind. 16, 8 N. E. (2d) 986. The *McConnell* case held in the following pertinent syllabus:

> "1. A state court's equity powers are ineffectual against valid exercise of legislative power by United States Congress."
>
> "2. A state court cannot limit United States citizen's exercise of right conferred by valid act of Congress, since state itself in exercise of full sovereign power cannot limit or abridge such right."
>
> "3. An Indiana equity court had no power to enjoin Indiana citizen from prosecuting action in Federal Court of another state under Federal Employers' Liability Act, since such injunction would destroy federal right of litigant and obstruct federal court in performance of duty (Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 *et seq.*)."

The Supreme Court of Indiana reviews the law at considerable length and reaches the conclusion that:

"Congress can, and by the provisions of the Federal Employers' Liability Act, as construed and applied by the federal courts, has conferred upon any person asserting a cause of action under such act a federal right to bring the action in a District Court of the United States in the district in which the defendant may be doing business at the time of commencing such action; and has imposed upon such District Court the duty of accepting jurisdiction of such action. Consequently when a state court, as in the instant case, attempts to enjoin a litigant from prosecuting his cause of action, arising under the Federal Employers' Liability Act, in a District Court of the district in which the defendant is doing business, *such action, if effective, destroys a federal right of the litigant and obstructs the performance of a duty imposed by act of Congress upon a District Court of the United States. This is beyond the power of a state.*" (8 N. E. (2d) 986, 991.) (Italics ours.)

Akin to the Indiana cases differentiated in *McConnell v. Thomson, supra*, the cases of *B. & M. R. R. Co. v. Whitehead*, 29 N. E. (2d) 916; *Reed's Admx. v. Ill. Central R. R. Co.*, 182 Kentucky 455, 206 S. W. 794; *L. & N. R. Co. v. Rogan*, 172 Tenn. 593, 113 S. W. 743 and *C. M. & St. P. R. R. Co. v. McGinley*, 175 Wis. 565, 185 N. W. 218, are instances in which the suit of the employee was brought in the state court. None are in point here.

So, too, in *Michigan Central R. R. Co. v. Mix*, 278 U. S. 492, 73 L. Ed. 470, the suit was brought by the employee in a state court and not in a federal court in a district in which the defendant was doing business.

Davis v. Farmers' Cooperative Co., 262 U. S. 312 was not a Federal Employers' Liability Act case. It involved an action filed in a state court under color of a state statute in a state where the company did not own or operate any railroad, but only maintained an agent for the solicitation of traffic.

The *Davis* case was differentiated in *State of Missouri v. Taylor*, 266 U. S. 200, 45 S. Ct. 47, 69 L. Ed. 200, in which case this Court said:

> "No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive right. *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 511, 35 S. Ct. 865, 59 L. Ed. 1433; *A. C. L. R. R. Co. v. Burnette*, 239 U. S. 199, 36 S. Ct. 75, 60 L. Ed. 226; *New Orleans etc. v. Harris*, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *Yazoo & Miss. Valley R. R. Co. v. Mullins*, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754."

In *Hoffman v. The State of Mo., etc.*, 274 U. S. 21, 47 S. Ct. 485, 71 L. Ed. 905, this Court again differentiated the *Davis* case. Here the action was brought in a state court under the Federal Employers' Liability Act. The cause of action arose at Wichita, Kansas and suit was brought in Sedalia, Mo. This Court denied the applicability of the *Davis* case and said:

> "* * * Even a foreign corporation is not immune from the ordinary processes of the courts of a state, where its business is entirely interstate in character. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened."

This Court next construed the *Davis* case in *D. & R. G. R. Co. v. Terte*, 284 U. S. 284, 76 L. Ed. 295, 52 S. Ct. 152. There the plaintiff employee had sued the D. & R. G. R. Co. and the Sante Fe jointly in Missouri, the cause of action arising in Colorado. The D. & R. G. did not own or operate any line in Missouri. The Santa Fe did own and operate railroad lines in Missouri and did business there. The Court held that the Santa Fe was properly sued in the Missouri court even though its co-defendant was not and followed the *Hoffman* case, *supra*. In the *Terte* case the plaintiff claimed that his witnesses were residents of Mis-

souri and thus were more easily available to him there than they would be in Colorado. This Court apropos the matter of inconvenience as related to jurisdiction said:

> "Further as a practical matter courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses, or refuse jurisdiction according to the relative inconvenience of the parties."

See also *International Milling Co. v. The Columbia Trans. Co.*, 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396. There a suit between Delaware corporations was brought in Minnesota on a cause of action which arose in Illinois. This Court pointed out that the "forum being in other respects appropriate" the jurisdiction was not affected because the chief witnesses reside in other states.

IV. PETITIONER'S ARGUMENT THAT ARTICLE IV, SECTION 2, IS INVOLVED IN INJUNCTIONS AGAINST SUITS IN STATE COURTS IS ERRONEOUS.

Petitioner's argument that no distinction ought to be drawn between an action brought in a state court and one brought in a federal court is bottomed on the erroneous notion that Article IV, Section 2 of the Constitution of the United States alone governs an employee's right to sue in a state court and that to enjoin such an action is to violate Article IV, Section 2. Article IV, Section 2 requires only that a state confer on the citizens of the several states all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances (*Cole v. Cunningham*, 133 U. S. 113); that is, one state, when, for instance, establishing regulations for the conduct of private business of a particular kind, can not give its own citizens essential privileges connected with that business which it denies to citizens of other states. (*Blake v. McClung*, 172 U. S. 252.) Article IV, Section 2 clearly does not profess to control the power of the state governments over the rights of its own citizens. (*Slaughter House*

Cases, 16 Wall. 77; *Detroit v. Osborne*, 135 U. S. 492; *McKane v. Durston*, 153 U. S. 687.) Thus if a state court undertakes to enjoin one of its own citizens it cannot be said to be violating the privileges and immunities clause of the United States Constitution. The right to bring an action in a state court, applicable alike to the citizens of the several states, springs from the constitutional and statutory provisions of the state which establishes the Court and defines its powers. (*Roberts Federal Liabilities of Carriers*, 2nd Edition, Vol. 2, p. 1856.)

V. PETITIONER'S CLAIMS CONCERNING INCONVENIENCE ARE PATENTLY EXAGGERATED.

The actual inconvenience which may be suffered by the petitioner, we submit, has been magnified many fold. The petitioner need fear no element of surprise. The respondent's claims are clearly set forth in his petition. The rules governing civil actions in Federal District Courts now eliminate any substantial element of surprise. Inquiry by depositions and interrogatories are available to the petitioner. It is the respondent who must first present his case. If he has no cause of action he will be non-suited. There is even available to the petitioner, if justified, an opportunity to dispose of the suit before trial by motion for a summary judgment: Rule 56(b). The new rules contemplate that the element of surprise be minimized if not completely eliminated. Agreement as to what issues exist between the litigants is possible. Magnifying the inconvenience to which the petitioner will be subjected, however, can be of no avail if, as we submit, no state court has the power to deny to the respondent the exercise of the right vested in him by an express Congressional regulation of interstate commerce.

VI. AUTHORITIES IN OPPOSITION TO PETITIONER'S CLAIMS.

The utter absence of authority in support of petitioner's contention is not without significance. On the other hand the denial of petitioner's contentions by the many courts which have passed upon them is a compelling and significant fact.

Chicago, M. & St. P. Ry. Co. v. Schendel, supra, presented an effort on the part of an Iowa state court to restrain an action under the Federal Employers Liability Act in a U. S. District Court in Minnesota. An Iowa statute forbade the employee's action. The Circuit Court of Appeals held:

> "Under the Employers' Liability Act, Section 6, the * * * jurisdiction thus conferred on the Courts of the United States cannot be interfered with by a state, either through its Legislature or Courts, and a state statute which prohibits a citizen of a state from bringing an action under the Act in a Federal Court of a district in which the defendant is doing business, is unconstitutional."

The third paragraph of the syllabus in the *Schendel* case, *supra*, reads:

> "A court of equity may not enjoin the bringing of an action in another jurisdiction on the ground of hardship or inconvenience to defendant and witnesses where the right to sue in such other jurisdiction is given by law."

The Court discussing the conflict between the Iowa public policy, as expressed by statute, and the employee's right under Section 6 says at page 330:

> "The Iowa public policy cannot destroy this federal right. In a conflict between such policy and a federal right given to a citizen of Iowa, the public policy must yield. * * *"
>
> "* * * It (the Iowa statute) amounts to a nullification of the federal statute."

We submit that *C. & O. v. Vigor, supra*, is on all fours with the instant case. The pertinent syllabus of the 6th Circuit Court of Appeals reads:

"2. Railway company held not entitled to injunction against administratrix's prosecution of action against it for employee's death, in Federal Court for the district in which it is doing business, on the ground of inconvenience or extra expense in producing witnesses residing in another state, wherein deceased was injured and administratrix resided.

"3. Railway company held not entitled to injunction against prosecution of suit against it, for employee's death, in Federal Court for district of another state than that in which plaintiff and defendant's witnesses residing and deceased was injured, on the ground that defense of such suit would place unreasonable burden on interstate commerce.

"4. Congress, having power to regulate interstate commerce, may place incidental burdens thereon, by jurisdictional statutes, such as act authorizing filing of suit for damages, under the Federal Employers' Liability Act, in any district wherein defendant is doing business."

The briefs of both the petitioner and respondent in the *Vigor* case, *supra*, in this Court, indicate clearly that the question in that case was identical with the question raised by the instant petition.

"The lower courts regarded the Federal Employers' Liability Act, permitting the filing of the respondent's action in Hammond, Indiana, as controlling, and treated the said act of Congress as one inhibiting such a case as the railway company instituted for an injunction." Petitioner's Brief, page 9, *C. & O. v. Vigor* (U. S. Supreme Court) *supra*.

"The real question involved is whether or not the District Court of the United States for the Southern District of Ohio (Sixth Circuit) may enjoin respondent from prosecuting a suit in the District Court of the United States for the Northern District of Indiana (Seventh Circuit) to recover damages for the death of

her intestate under the provisions of the Federal Employers' Liability Act, it being admitted that deceased was engaged in interstate commerce at the time of his injury and that petitioner was doing business in the Northern District of Indiana at the time the suit was filed." Respondent's Brief, page 2, *C. & O. v. Vigor* (U. S. Supreme Court) *supra*.

The Court, in the *Vigor* case, *supra*, after indicating the grounds upon which the injunction was sought, namely "inequitable conduct on the part of the defendant, and imposition of an unconscionable hardship on the plaintiff, in the institution and prosecution of the action," says, on page 8:

> "The plaintiff, it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in Court in the Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time. We held, in *Southern Railway Company vs. Cochran*, 56 Fed. (2d) 1019, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a Court of equity, in enjoining its prosecution in the face of the statute, giving the right to bring the action in that jurisdiction. This ruling is consonant with established authority and is controlling in the case at bar."

The *Cochran* case, *supra*, presented a situation where the suit in question was brought in the Federal District Court in Kentucky, and plaintiff resided in South Carolina, where the accident occurred and where all the witnesses allegedly lived. It was urged that the defendant was a Virginia corporation which would be obliged to transport about 15 witnesses 417 miles, and maintain them at the place of trial at a cost of about $2,000.00; that the railway witnesses were employed in interstate commerce, and that their absence from their place of employment

would place a burden on and unduly interfere with interstate commerce. The Court at page 1020 says:

> "Jurisdiction is here asserted by a court of the United States under the mandate of a federal statute. It must be borne in mind that Congress has the power to regulate interstate commerce. The states have no such power. *If the effect of a federal statute conferring jurisdiction is to place a burden upon interstate commerce, the power for that purpose exists, and the remedy is legislative and not judicial.* (Italics ours.) The precise question here presented was considered by the Circuit Court of Appeals for the Eighth Circuit in *Schendel v. McGhee, District Judge*, 300 F. 273, 278. It was there said: 'We assume Congress could provide that actions in the federal courts should be brought at places where the same would not constitute a burden on interstate commerce, but Congress has not done so. It has given the right under the Federal Employers' Liability Act, hereinbefore discussed, to an injured party, or in case of his death to the duly constituted representative, to maintain an action in the Courts of the district where the defendant is doing business at the time the suit is commenced. *We are not concerned with the justice or the wisdom of such legislation. It being the law, it is a court's duty, where there is jurisdiction, to take and retain that jurisdiction and try the case.*' " (Italics ours.)

In the *Trapp* case, *supra*, the plaintiff was a citizen and resident of the State of Indiana. The defendant was the same corporation which brings the instant complaint. The plaintiff, while employed by the defendant, was injured in Garrett, Indiana. He brought his action in the District Court for the Northern District of Ohio. The company appeared specially and moved to dismiss for want of jurisdiction. The Court said:

> "The language of the first sentence of the amendment is clear and explicit. It confers upon an injured employee the privilege of bringing his action in any one of three districts of the United States.

The privilege thus conferred is not controlled by nor dependent on the jurisdiction conferred by a state upon its local Courts."

"By the express terms of the law, plaintiff may bring his action in this district. The fact that he might also have brought it where the cause of action arose (that is, in Indiana), or in the district of the defendant's residence (that is, the State of Maryland) does not deprive him of his right to select also this district, where the defendant is doing business at the time of commencing such action. * * * That much inconvenience may arise from permitting an action to be brought, when the plaintiff and all the witnesses on both sides may reside in Maryland or Indiana, are considerations merely of convenience and can be given controlling weight by Congress alone, which has power to make or amend the law."

In the *Connelly* case, 238 F. 932, 934, the Court said:

"It may well be that instances may arise when inconvenience may result from bringing the action where neither party resides and where the cause of action did not arise; but questions of convenience or of the work which shall be allotted to the various districts of the United States are, within Constitutional limitations, entirely questions for the legislative branch."

In *Norris v. Ill. Central Railroad Co.*, *supra*, the Court said, denying the defendant's contention:

"The defendant here asks that the court construe that authority (to sue under the Federal Employers' Liability Act in a district where the railroad is doing business) as though the Act provided that such action might be commenced in such a district, provided, that it did not impose an unreasonable burden upon interstate commerce. In other words it asks that the Court inject something into the Act which it does not contain."

To the same effect as the foregoing cases is also *Radcliffe vs. B. & O. R. R. Co.*, 7th Circuit, *supra*, where the Court quotes approvingly from *Southern R. Co. v. Cochran*, *supra*.

See also *Wood v. D. & H. Railway*, 63 Fed. (2d), 235, where the Court distinguishes a Federal Employers' Liability Act case in a Federal Court from the *Davis v. Farmers Co-operative Co.* case, *supra*, and the case of *Michigan Central R. R. Co. v. Mix*, *supra*, pointing out that such cases are "not relevant here."

VII. THE OHIO COURT HAD NO JURISDICTION ONCE THE DISTRICT COURT JURISDICTION ATTACHED.

The provisions of the second sentence of section 6, with reference to concurrent jurisdiction, were clearly not intended to limit the provisions of the first sentence, but were added for another and a very definite reason. The Supreme Court of Connecticut had held that a cause of action under the Federal Employers' Liability Act could not be prosecuted in a state court (*Hoxie vs. N. Y., N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754). Despite the feeling that such a ruling was wrong, it was thought well, however, to remove any possible doubt by providing that state courts should have concurrent jurisdiction with the United States courts.

The demurrer filed in the instant case raised also the question as to whether the Ohio State Court had jurisdiction of the subject of the action. (R. p. 7.)

The respondent's action in the District Court was filed before the petitioner's instant suit. (R. 2.) The jurisdiction of the District Court is admitted. Section 6 of the Federal Employers' Liability Act declares the concurrent jurisdiction of both state and federal courts. We submit that the Ohio State Court was further without power to enjoin the respondent from prosecuting his action already begun in the Federal Court because the jurisdiction of the District Court had already attached and therefore the Ohio Court had no jurisdiction of the subject matter of the action.

In *Missouri, etc. v. Taylor*, *supra*, this Court held that the right of a plaintiff to choose the venue in which to file

his cause of action is a substantive right which cannot be abridged. And in the same case this Court said:

> "The grant of concurrent jurisdiction implies that in the first instance, the plaintiff shall have the choice of the court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961."

The rule is also stated as follows:

> "Where state and federal courts have concurrent jurisdiction over a particular cause, plaintiff is entitled to elect his forum, and a grant of concurrent jurisdiction to such courts implies that in the first instance plaintiff shall have the choice of the court, and incidentally whatever remedial advantage inheres therein. This right is a valuable one and may not arbitrarily be denied." (21 *Corpus Juris Secundum*, p. 807, §527.)

The following language is from *Sharon v. Terry*, 36 F. 337, 355:

> "*The jurisdiction of the Federal Court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated or impaired by any proceeding in a court of another jurisdiction.* (Italics ours.) This doctrine we hold to be uncontrovertible. It is essential to an orderly and decent administration of justice and to prevent an unseemly conflict of authority which could ultimately be determined only by superiority of physical force on one side or the other."

In *Wallace v. McConnell*, 13 Pet. (38 U. S.) 138, 151, 10 L. Ed. 95, it was said:

> "The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, *that right could not be arrested or taken away by any proceedings in another Court.* This would produce a collision in the jurisdiction of Courts that would extremely embarrass the administration of justice." (Italics ours.)

See also *Terral v. Burke Construction Co.*, 257 U. S. 532, 42 S. Ct. 188, 66 L. Ed. 352; *Herron v. So. Pac. Co.*, 283 U. S. 91, 51 S. Ct. 383, 75 L. Ed. 857 and *Pennsylvania Casualty Co. v. Pennsylvania*, 294 U. S. 189, 197, 55 S. Ct. 386, 79 L. Ed. 850, in which latter case the Court said:

> "The jurisdiction conferred on the District Courts by the Constitution and laws of the United States can not be affected by state legislation."

In 14 *R. C. L.*, p. 419, Sect. 122, it is said:

> "It is a general rule that *a state court has no power to enjoin parties to an action in a federal court from further prosecuting that action* where it appears that the federal court first acquired jurisdiction of the cause." (Italics ours.)

The foregoing proposition of law was announced also in *Riggs v. Johnson County*, 6 Wall. (73 U. S.) 166; 18 L. Ed. 768; *Moran v. Sturges*, 154 U. S. 256, 14 S. Ct. 1019, 38 L. Ed. 981, and *Central National Bank v. Stevens*, 169 U. S. 432, 18 S. Ct. 403, 42 L. Ed. 807.

The petitioner seeks to avoid the impact of the foregoing principles by asserting that it does not seek to interfere with or impair the jurisdiction of the District Court. The case of *Steelman v. All Continent Co.*, 301 U. S. 278, is cited in support of its contention that the relief sought by petitioner would not interfere with the jurisdiction of the District Court.

The *Steelman* case involved the power of a court of bankruptcy to enjoin the prosecution of a suit in another federal court upon the ground that the suit, if pressed to a decree, would thwart an inquiry into frauds charged against the bankrupts, or make relief against them difficult. The Court pointed to the provisions of the Judicial Code, and to the Bankruptcy Act, enforcing the authority given by the Judicial Code. Such act invests courts of bankruptcy with jurisdiction at law and in equity to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the provisions of the act. The Court,

referring to these statutes, points out that the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is inherent in a court of bankruptcy. The situation in the *Steelman* case is entirely different from that in the case at bar and cannot, in any sense, be construed to warrant injunctive relief against the exercise of a substantive right granted by valid legislative act of Congress. To grant such injunctive relief would destroy and impair to all intents and purposes the admitted mandatory jurisdiction of a federal court with similar jurisdiction, which, in point of fact in the *Steelman* case, the Court regarded as so important as to warrant injunctive relief against action by the individual which would interfere with such jurisdiction.

The Court said in the *Steelman* case:

> "The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is inherent in a court of bankruptcy. * * * Jurisdiction to administer the estate draws to itself when once it has attached, an incidental ancillary jurisdiction to give protection to the estate against waste or disintegration while frauds upon its integrity are in process of discovery."

In *Bryant v. A. C. L. R. Co., supra*, in order to sustain its position the Circuit Court, actually regarded the sought after injunction against the Company as an injunction against the proceedings of the state Court for it based its denial of such injunction upon the ground that to grant it would violate Section 265 of the Judicial Code.

The petitioner's prayer in the instant case was for an injunction to restrain the respondent from prosecuting his action in the District Court he chose and from commencing and prosecuting any other action in that court. In effect such an injunction, if granted, would of necessity impair, frustrate and interfere with the jurisdiction of the District Court which had already assumed jurisdiction under a valid

federal regulation within that orbit of constitutional power in which the Congress is supreme. Such an injunction would be an injunction against the Court in which the respondent's suit was instituted by him. See *Peck vs. Jenness*, 7 How., 48 U. S. 612, 625, 12 L. Ed. 841; *Hill vs. Martin*, 296 U. S. 393, 403, 56 S. Ct. 278, 80 L. Ed. 293; *Oklahoma Packing Co. vs. Oklahoma Gas & E. Co.*, 309 U. S. 4, 9, 60 S. Ct. 215, 80 L. Ed. 537, in which case, this Court, finding the decision of the *Stedman* case, *supra*, "plainly inapplicable," at page 9, says:

> "that the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial."

Since the respondent did not seek an injunction from the District Court to restrain the petitioner from further proceeding with the instant suit, the situation presented by the *Bryant*, *Schendel* and *Painter* cases *supra*, is not here presented. The *Bryant* case is directly in conflict with the doctrine of the *Schendel* and *Painter* decisions. We do not enter into any extended discussion of the relative merits of the conflicting decisions, save as such authorities referred to throw light upon the inquiry as to whether a state court has jurisdiction of the subject matter of the action.

Thus in *Kline v. Burke Construction Co.*, 260 U. S. 226, 228, 229, 43 S. Ct. 79, 67 L. Ed. 226, the Court points out that Section 265, Judicial Code, invoked by the Court in the *Bryant* case, *supra*, is to be construed in connection with Section 262, authorizing the U. S. courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law," and the court says that "where a federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court."

To the same effect are *Continental Illinois National Bank and Trust Co. v. Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110; *Looney v. Eastern Texas R. Co.*, 247 U. S. 214, 62 L. Ed. 1084, 38 S. Ct. 460; *Hull v. Burr*, 234 U. S. 712, 34 S. Ct. 892, 58 L. Ed. 1557; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205 and cases therein cited. See also *Essanay Film Co. v. Kane*, 258 U. S. 358, 361, 42 S. Ct. 318, 66 L. Ed. 658, where the Court points out:

> "in order to maintain the jurisdiction of a federal court properly invoked, and render its judgments and decrees effectual proceedings in a state court which would defeat or impair such jurisdiction may be enjoined. * * * The effect of this, as will be observed, is but to enforce the same freedom from interference, on the one hand, that it is the prime object of § 265 to require on the other."

In the *Painter* case, *supra*, the following syllabus is pertinent:

> (1) In determining whether state court injunction purporting to enjoin prosecution of federal court action brought under the Federal Employers' Liability Act by administratrix for the death of decedent, was of limited *in personam* character or was an injunction against the federal court, the realistic effect of the injunction process was required to be considered.
>
> (2) Where federal court action for death of decedent was brought under the Federal Employers' Liability Act an injunction issued by Tennessee state court on *ex parte* application of railroad company which purported to enjoin prosecution of the federal court action or prosecution of any action in any court except courts sitting in certain cities, was not construable as being merely an injunction *in personam* against the administratrix, but constituted an injunction against the federal court.
>
> (4) The state and federal system of concurrent jurisdiction requires courts of concurrent jurisdiction

to be left free to decide such *in personam* actions for money judgments as may be before them.

(6) A state court does not have such broad concurrent jurisdiction with federal court that it may decide whether the federal court is properly proceeding with a case which is within its legal jurisdiction.

(7) Neither state nor federal court has jurisdiction to enjoin the other except when one interferes with the province of the other and then the court interfered with has exclusive jurisdiction to prevent the interference.

(8) Where federal court action was brought under the Federal Employers' Liability Act a state court having concurrent jurisdiction might proceed with an action to adjudicate upon the merits as an "action *in personam* for a money judgment" but an action for injunction to restrain the federal court action would not be an action of such nature and would not be within the power of a state court.

The *Painter* case, at page 102, points out that:

"a realistic construction should be given to injunction issued by courts of a state. The effect of the Tennessee injunction is to oust the federal District Court of its jurisdiction over the case pending for damages as really as the injunction issued pursuant to the supplemental bill ousts the jurisdiction of the Tennessee chancery court."

On page 106, the Court in the *Painter* case says:

"The compelling ground of decision there (the *Schendel* case *supra*) was the necessity that federal courts be free to decide cases within their jurisdiction without interference from state courts.

We think that the nature of the dual system compels the conclusion that a state court which assumes to enjoin such an action in a federal court does so in excess of its jurisdiction and renders a decree which is void insofar as it affects proceedings in the federal court."

We submit that any injunction issued by an Ohio state court under the circumstances obtaining in this case, would amount to an impairment of the District Court's jurisdiction. Such jurisdiction having attached properly and completely, no state court has jurisdiction of the subject matter, such as to warrant it to do anything to frustrate such duty of the District Court to hear and finally determine the controversy before it.

To say that the respondent may still pursue his action in the District Court but leave himself subject to contempt proceedings and to say that such a situation does not amount to an interference with the District Court is to indulge in mere sophistry. The state court interference ought not to be direct or indirect. In the instant case the recurrent temporary injunctions issued pending decision by higher tribunals have had the effect of preventing the District Court from exercising its jurisdiction. To expose a citizen of the United States to punishment because he seeks to invoke a law of the United States is certainly to deny that the Constitution and the laws made thereunder are the supreme law of the land and are as much the law of the State as are the State enactments. *C. M. & St. P. v. Schendel* 292 Fed. 326; Art. VI, Clause 2, Constitution of the United States.

See also *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 255, 25 S. Ct. 251, 257, 49 L. Ed. 462 where the Court says:

> "The exercise by the Circuit Courts of the United States of the jurisdiction thus conferred upon them is pursuant to the supreme law of the land and will not in any proper sense entrench upon the dignity, authority or autonomy of the states for each state by accepting the Constitution has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them."

The answer, of course, is that no citizen of the United States can be exposed to punishment by a state because he

exercises a right bestowed upon him expressly, unambiguously and intentionally by the Congress, acting within that realm of power which belongs exclusively to it.

CONCLUSION.

To sustain petitioner's contention would be tantamount to:

> "taking a privilege from one upon whom it is conferred by statute, and giving it to the opposite party against whom that specific privilege was granted." *C. & O. v. Vigor*, 17 Fed. Supp. 602.

Were the petitioner's contentions to be allowed we should have a situation so chaotic as to tear down and nullify the structure of the Federal Employers' Liability Act so clearly intended to be constructed in the interest of the employee. Uncertainty and disadvantage would replace definiteness and benefit to the employee inherent in any authorized jurisdiction. That which the Congress intended to be a substantive right reposed in the employee would be distorted into a boomerang which would strip him of any worthwhile power to exercise the right intended to be granted to him, and render him instead subject to the convenience of the employer and the fancies and predilections, perhaps, of varying concepts of different courts of equity. In each instance in which the employee, under such circumstances, undertook to sue his employer in a court not to the employer's liking, the employee would face the dreary prospect of two suits with all the attendant expense and delay incidental thereto. Instead of a prompt disposition of the claims of the employee or his dependents in case of his death, there would be delay and almost insurmountable obstacles. Delay operates to the advantage of the defendant. The net result would be to mutilate Section 6, distort the purpose of the Act and deprive a citizen of the United States of a privilege specially intended for him and vest it indeed in the very defendant company against whom the privilege was intended to be lodged.

The contentions urged by the petitioner are patently unsound. Congressional power over interstate commerce is exclusive and plenary. No state court can destroy the valid exercise of this legislative power. The very statement of the petitioner's claim rebels against its acceptance.

Were the respondent's specific, express, clear and validly created federal right made subject to regulation by different courts of equity in the several states it would soon become in the picturesque language attributed to Abraham Lincoln "as thin as the homeopathic soup made by boiling the shadow of a pigeon that had starved to death."

The fact is that the respondent's right to invoke the choice of a District Court within the provisions of Section 6 is an absolute substantive federal right which no state court and no state may frustrate, deny or thwart.

We, therefore, most respectfully submit that the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

CIVIL ACTION No. 21-M.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
a corporation,
Plaintiff,

vs.

JESSE C. CLEM AND HENRY GASSAWAY SHORES,
Defendants.

HARRY H. BYRER, ESQ., of
Baltimore, Maryland,

J. O. HENSON, ESQ., and

STEPHEN AILES, ESQ.,
Martinsburg, West Virginia,
Attorneys for Plaintiff.

H. G. SHORES, ESQ., of
Keyser, West Virginia, and

WAYLAND K. SULLIVAN, ESQ., of
Cleveland, Ohio,
Attorneys for Defendants.

MEMORANDUM OF OPINION.

BAKER, *District Judge*.

STATEMENT OF CASE AND FINDINGS OF FACT.

The plaintiff is a corporation, incorporated under the laws of the State of Maryland, with its principal place of business at Baltimore. The defendants are both citizens and residents of Keyser, Mineral County, Northern Dis-

trict of West Virginia. The plaintiff is engaged in both interstate and intrastate commerce in Maryland, West Virginia, Ohio, and several other states.

In October of 1939 the defendant, Clem, met with an accident while working as an employee of the plaintiff in its shops at Keyser, West Virginia. In October, 1940, he instituted an action, under the Federal Employers' Liability Act, in the United States District Court for the Northern District of Ohio, at Cleveland, claiming damages in the sum of $30,000.00 as a result of the aforesaid injury. He employed, among others, the defendant, Shores, as one of his counsel.

This action was brought, seeking to restrain the defendants from prosecuting the action in Cleveland upon the grounds that the same was instituted for the purpose of annoying, harassing, and vexing the plaintiff herein, and that the forum chosen, to-wit, the United States District Court in Cleveland, was selected because of its distance from the scene of the accident and because its dockets are more congested than those of this Court, and that these two facts would make the defense of the action more difficult, more expensive, and less convenient than such defense would be in a forum near the scene of the accident, and that all of this constitutes an harassment of the plaintiff and an undue and unjust burden upon interstate commerce.

There was filed with the Bill of Complaint a written motion for a preliminary injunction. Service of process, as well as of a copy of the motion for preliminary injunction, and of a notice that a motion would be made in open court at Martinsburg on November 8, 1940, for such injunction, was duly had upon both defendants. Upon November 8th, counsel for the Railroad Company filed with the Court a letter from Mr. Shores, in which he advised that neither defendant was able to be present upon November 8th, and in which he stated that the defendants had no objection to the entry of a temporary restraining order. Ac-

cordingly, a temporary restraining order was entered, restraining the defendants as prayed in the Bill of Complaint. At the same time the motion for a temporary injunction was set down for hearing at Wheeling on November 15th.

Upon the latter day, Mr. Shores appeared in person, and Mr. Clem by counsel, and both plaintiff and defendant advised the Court that they wished to file written briefs upon the legal questions involved, and both parties agreed that the temporary restraining order should continue in force until the further order of the Court.

At the hearing in Wheeling, the plaintiff introduced testimony to substantiate the allegations of the Bill of Complaint. By this testimony it was established that all of the eye-witnesses to the accident reside in the near vicinity of Keyser, West Virginia; that certain of the records, which may reasonably be presumed will be necessary for the defense of this case, are kept at either Keyser or Baltimore; that physicians, who may reasonably be presumed to be necessary witnesses in the defense thereof, reside at Keyser, Cumberland, Maryland, and Baltimore. It was further established that the Circuit Court of Mineral County, West Virginia, holds regular terms at Keyser; that this Court holds regular terms at Martinsburg, a distance of approximately 100 miles from Keyser; that the District Court of the United States for the District of Maryland holds regular terms at Cumberland, a distance of approximately 30 miles from Keyser; that Cleveland is approximately 350 miles from Keyser.

There was testimony tending to show that the dockets of the United States District Court at Cleveland are relatively more congested than the dockets of this Court at Martinsburg.

There was testimony that to defend this case at Martinsburg would probably cost the defendants, for witness fees, in the neighborhood of $326.58 and that to defend the same in Cleveland the probable attendance of the same witnesses would involve a cost of approximately $2,254.39.

Both of these figures were, of course, estimates. But from all the evidence, the Court finds as a fact that it is reasonable to presume that the cost of defending this action at Cleveland would exceed the cost of defending the same at Martinsburg by $1900.00, and that it could be defended in either the United States District Court at Cumberland, or in the Circuit Court of Mineral County at Keyser, for a still lower amount than it could at Martinsburg.

At the conclusion of the taking of testimony, the defendants dictated into the record a motion which is, in effect, a motion to dismiss this action. That motion, and the motion for temporary injunction, are now before the Court and, insofar as any of the above may be pertinent to the decision upon these motions, the Court now finds the same to be established as facts.

Conclusions of Law.

It is so well-established as to scarcely need citation of authorities that Courts of Equity have inherent jurisdiction to restrain the prosecution of actions at law where such prosecution would result in an unfair advantage to the party seeking to maintain the same. See *Story's Equity Jurisprudence* (13th Ed.), Sec. 885; 5 *Pom. Eq.*, Section 670; *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538. The question presented here is whether the facts justify an application of that equitable doctrine, especially in view of the venue section of the Federal Employers' Liability Act.

As originally passed in 1908, the Federal Employers' Liability Act, 45 U. S. C. A. 56, reads as follows:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

As thus drawn, the Federal Courts held that actions brought thereunder could be maintained only in the State in which the defendant was incorporated. This made it necessary

for plaintiffs, in many instances, to either abandon claims or to maintain actions in Courts hundreds of miles from the scene of the accident and the residence of witnesses. To cure this situation, upon April 5, 1910, the Statute was amended to read as follows:

> "*Actions; Limitations; Concurrent Jurisdiction of Courts; Removal of Case in State Court.* No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.
>
> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, *or in which the defendant shall be doing business at the time of commencing such action.* The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

It has been argued upon behalf of the plaintiff, that this section was intended merely to confer a possible venue and that there is nothing contained therein, or contained elsewhere in the Act, which deprives the Court of Equity of its ancient power to restrain vexatious actions. This Court heretofore came to the conclusion that this position was correct, and so held in a prior case. *Baltimore & Ohio Railroad vs. Bole*, 31 Federal Supplement 221. However, at the time of the decision in the *Bole* case, the Court's attention was not directed to the decision of the District Court for the Southern District of Ohio, in the case of *Chesapeake & Ohio Railway Company vs. Vigor*, 17 F. Sup. 662, nor to that of the Circuit Court of Appeals for the Sixth Circuit, affirming the same. See *Chesapeake & Ohio Railway Co. vs. Vigor*, 90 F. (2) 7.

No case from the Fourth Circuit Court of Appeals, nor any opinion by the Supreme Court of the United States,

touching upon this precise question, has been presented for the Court's consideration, and knowing the ability and diligence of counsel, I feel safe in assuming that none exist. On the other hand, the *Vigor* case, above cited, appears to me to be directly in point. The facts and holding in that case are adequately summarized in the syllabus to the District Court decision, which reads as follows:

> "Railroad held not entitled to injunctive relief, to restrain prosecution in district other than that in which accident occurred, of action for employee's death, notwithstanding objections of difficulty or inability of producing witnesses or records, added expense, disadvantage, and inconvenience to railroad, difficulty of applying law, and objection that action sought to be enjoined would burden interstate commerce, where action was brought in district in which railroad was doing business (Federal Employers' Liability Act, Par. 6, as amended 45 U. S. C. A. Par. 56)."

This decision was, as above noted, sustained by the Circuit Court of Appeals for the Sixth Circuit, and Certiorari was denied by the Supreme Court of the United States. See 302 U. S. 705.

Under these circumstances, I feel that I must follow the decision in the *Vigor* case, and applying that decision to the facts before me, must refuse a temporary injunction, must dissolve the temporary restraining order, heretofore issued, and must dismiss the present action.

Much stress was laid, in the briefs for the plaintiff, upon the decision of the Circuit Court of Appeals for the Seventh Circuit, in *Ex Parte Crandall*, 53 Fed. (2) 969. It is true that the opinion in that case contains a great deal of dicta which would seem to substantiate the Railroad Company's position. A study of that case, however, reveals that the question for decision was radically different from the one now before this Court. In that case a railroad employee was killed in an accident in Tennessee. His widow qualified as Administratrix of her husband's estate

in Vanderburgh County, Indiana, and then instituted action for damages resulting from his death in the State Court in St. Louis, Missouri. It should be noted immediately that the action for death was instituted in a State Court, not in a United States Court. Upon application by the Railroad Company, the State Court in Indiana restrained the prosecution of the Missouri State Court action. The plaintiff ignored the Court's restraining order and proceeded with the Missouri prosecution. The Indiana Court thereupon adjudged the plaintiff in contempt, assessed a fine, and ordered her confined in jail for three months, the imprisonment to be suspended upon dismissal of the St. Louis action. The case reached the Federal Court upon an application for habeas corpus, testing the legality of her confinement. This application was refused. It is true that in the opinion the Federal Court held that the State Court of Indiana was acting within its lawful jurisdiction when it enjoined the Administratrix from prosecuting the Missouri action, but it is apparent, from a mere statement of the facts, that many principles were involved in the *Craudall* case which are not before us here. In addition, the Court specifically stated in its opinion

> "Whether the power of the State Court to restrain would extend to the commencement of such suits *in any Federal Court* is not here involved."

I have commented at length upon the *Craudall* case principally because of the emphasis placed upon it by plaintiff's counsel. As to the other cases cited, suffice it to say that none involve the precise question as the case at bar. At the very best, all present merely analogous situations. The *Vigor* case is the only one directly in point, which has come to my attention.

As stated above, I feel that I must follow its decision.

W. E. Baker (signed)
U. S. District Judge.

January 15, 1941.